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CASE NUMBER: 2001-BLA-358

IN THE MATTER OF

STEVEN WORLEY,
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

APPEARANCES:

Joseph Kelly, Esq.
On behalf of Claimant

Marsha L. Semon, Esq.
On behalf of the Director

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a fourth claim for benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq*. (The "Act"), brought by Steven Worley (Claimant) and opposed by the Director, Office of Workers' Compensation Programs (Director). The matter could not be resolved administratively and at the request of Claimant, a formal hearing was held in Pensacola, Florida on January 14, 2002. Post-hearing briefs were filed by the parties.

I. PROCEDURAL HISTORY

This is Claimant's fourth claim for federal black lung benefits. His first Claimant was filed in 1975, and denied in 1979 by the District Director. Claimant filed his second claim under the Act in 1993 and

following an initial denial, a formal hearing was held with Administrative Law Judge Robert S. Amery

who denied benefits. Judge Amery determined that Claimant had seven years of coal mine employment, but did not find that Claimant established pneumoconiosis by x-ray evidence, arterial blood-gas studies, or by pulmonary functions tests. Similarly, Judge Amery held that no doctor attributed Claimant's respiratory or pulmonary impairments to his coal mine employment. Claimant appealed this decision the BRB who dismissed the appeal as untimely.

Claimant's third claim, filed on March 10, 1997, was denied by the District Director and referred to Administrative Law Judge Larry Price. On March 12, 1999, Judge Price issued a decision finding that this was a duplicate claim, but that Claimant had established a material change in condition through the pulmonary function study performed by Dr. Zawahry, which related that Claimant had a totally disabling respiratory impairment. Deciding not to adopt Judge Amery's finding that Clamant had seven years of coal mine employment because the Director did not have a full and fair opportunity to litigate that issue in the prior proceeding, Judge Price determine that Claimant only had ten months of coal mine employment based on his Social Security records.

Like Judge Amery, Judge Price determined that the x-ray evidence failed to establish pneumoconiosis. Evaluating the medical reports, Judge Price discounted the opinion of Dr. Zawarhy, who determined that Claimant suffered from pneumoconiosis on the basis that Dr. Zawahry credited Claimant with seven years of coal mine employment, and because the pulmonary function test, as well as the x-rays, were either invalid or unreadable according to other physicians. Judge Price then credited the medical report of Dr. Michos who found no evidence of pneumoconiosis based on a exposure history of ten months and the preponderance of the x-ray reports showing no pneumoconiosis.

On March 23, 2000, the Benefits Review Board affirmed Judges Price's decision but remanded the case back to the district director so that the claimant could be provided with a complete and credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim as required by the Act. Subsequently, Dr. Zawahry provided Claimant with a complete pulmonary function examination and issued a new report, dated August 7, 2000, crediting Claimant with the proper length of coal mine employment. In his report, Dr. Zawahry stated that Claimant had a minute percentage of his pulmonary impairment directly related to his work history. On October 19, 2000, the District Director denied the claim. The matter was then set for a formal hearing on January 14, 2002 in Pensacola, Florida.

At the formal hearing, the Director stipulated that a material change in condition existed in that Claimant had a totally disabling respiratory condition. (Tr. 10-11). Furthermore, the parties agreed that the only issue in this case was whether Claimant could establish legal pneumoconiosis as opposed to clinical pneumoconiosis through the report of pulomonoligst Dr. Zawahry. (Tr. 17-18).

II. DISCUSSION

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 207 (4th Cir. 2000), the Fourth Circuit held that in order for a claimant to obtain black lung benefits, the claimant must prove by a preponderance of the evidence that (1) he has pneumoconiosis; (2) the pneumoconiosis arose out of his coal mine employment; (3) he has a totally disabling respiratory or pulmonary condition, and (4) pneumoconiosis is a contributing cause to his total respiratory disability. The Fourth Circuit also held, contrary to the Board's view, that 20 C.F.R. § 718.202(a) required consideration of all relevance evidence rather than mere discrete subsections of § 718.202(a), *id*. at 208, and specifically encouraged ALJ's to be mindful of the distinction between medical or clinical pneumoconiosis, and legal pneumoconiosis. *Id*. at 210 fn. 8.

A. Legal Pneumoconiosis

Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. § 718.202(a)(2) (2001). This definition includes both restrictive and obstructive pulmonary diseases. *Id*. A determination that a miner has legal pneumoconiosis may be made when a physician "exercising sound medical judgment, notwithstanding a negative X-ray, finds the minor suffered from pneumoconiosis." 20 C.F.R. § 718.202(a)(4) (2001). Such a determination by a physician "shall be based on objective medical evidence such as . . . pulmonary function studies, physical performance tests, physical examination, and medical and work histories [and] shall be supported by a reasoned medical opinion." *Id*. A well reasoned medical opinion is one with underlying documentation adequate to support the physicians conclusions. *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989). A doctor gives a reasoned medical opinion when the totality of his report indicates that the doctor considered the objective medical evidence and the report may be well reasoned even if the doctor did not offer any explanation for his conclusions. *Compton*, 211 F.3d at 212.

In *Biggs v. Consolidated Coal Co.*, 8 BLR 1-317, 321-22 (1985), the Board upheld the decision of an ALJ awarding benefits when the miner's pulmonary impairment was aggravated by his exposure to coal dust. In *Biggs*, the miner had bronchitis that was not related to his work in the coal mine and anthracosilicosis that arose out of his coal mining employment that combined with his non work related disease to create a totally disabling pulmonary impairment. *Id*, at 319. Expressly approving a "significant aggravation" theory, the Board rejected the premise that pneumoconiosis had to be totally disabling in and of itself before it could be compensable. *Id*. at 321. Rather, all that is required by the Act is that coal mine employment significantly relate to or substantially aggravate a chronic pulmonary impairment. *Id*. at 322. *See* 20 C.F.R. § 718.201(b) (2001).

A(1) Dr. Zawarhy's Medical Report

Pursuant to the Boards order of remand, Dr. Zawahry performed a pulmonary function evaluation and issued a report on August 7, 2000. In his report, Dr. Zawahry stated that Claimant had a minute percentage of his pulmonary impairment directly related to his work history. (DX 40, p. 6). Dr. Zawarhy based his opinion on a corrected coal mining history of ten months, a complete

physical examination, arterial blood gas studies, x-rays and his pulmonary function examination. *Id*. at 4-7. After the formal hearing, I directed the parties to take Dr. Zawahry's deposition. (Tr. 30). In that deposition, Dr. Zawahry related that Claimant was totally disabled secondary to a respiratory impairment. When asked whether Claimant's ten months of exposure contributed to or aggravated his respirator impairment, Dr. Zawahry stated that Claimant had "severe obstructive airway disease and small airway disease with reversibility after bronchodilators compatible with emphysema rather than pneumoconiosis." (Zawahry Deposition at 7). Based only on his physical exam, excluding the pulmonary function studies and chest x-rays, Dr. Zawahry related that Claimant's exposure to coal dust could have contributed to or aggravated his COPD if it was proven that Claimant had worked for ten months with a daily inhalation of coal dust without a protective respirator in a coal mine. *Id*. at 7-8.

In reviewing his report of May 24, 2000, Dr. Zawahry also related that Claimant had significant obstructive small airway disease that was not significantly improved after the use of bronchodilators. (Zawahry Deposition at 12). Combined with a history of coal dust exposure and what he interpreted as x-ray changes, Dr. Zawahry opined to a reasonable medical probability that the obstructive impairments were secondary to Claimant's coal mine exposure. *Id*. at 13. Furthermore, Dr. Zawahry detected a restrictive ventilatory impairment which could not be cause by exposure to cigarette smoke, and could only be due to coal dust exposure. *Id*. Claimant's overall pulmonary impairment, rated as severe, was a result of both his restrictive and obstructive lung disease components. *Id*. at 14.

A(2) Dr. Michos' Medical Report

On January 16, 1998, Dr. John Michos, a pulmonologist, reviewed Claimant's medical evidence and opined that Claimant did not have pneumoconiosis based on a ten month exposure period. (DX 27, p. 1). At the time of his examination, he stated that Claimant did not have a total respiratory disability. *Id*. Dr. Michos also based his opinion in part on "the majority of Board certified B reading radiologists who have found the absence of CWP on numerous films." *Id*. Furthermore, Dr. Michos documented a moderate airflow obstruction which was only partially reversed with the use of bronchodilators, a finding which he attributed to tobacco abuse. *Id*.

A(3) Weighing the Medical Reports

As already noted, after discrediting the report of Dr. Zawarhy because it was based on an incorrect exposure history, Judge Price credited the remaining report of Dr. Michos. (DX 34, p. 7). On remand, faced with two conflicting physician reports, I must re-weight the evidence in light of Dr. Zawarhy's corrected report. In re-evaluating Dr. Michos's report I note that he relied on the numerical superiority of negative x-ray readings to substantiate his conclusions. Numerical superiority is not a proper method for weighing conflicting x-ray evidence because such an approach encourages multiple readings in a quest for numbers, and illustrates little more than disparity in the financial resources of the parties. *Woodward v. Director, OWCP*, 991 F.2d 314, 321 (6th Cir. 1993). Additionally, Dr. Michos did not explain his conclusion that ten months of coal mine exposure could

not contribute to a totally disabling respiratory impairment.

Considering Dr. Zawarhy's opinion, that ten months of coal mine exposure would be sufficient to contribute to, or aggravate Claimant's pulmonary impairment, I note that Claimant testified in 1999 that about three fourths of his employment was underground and he was exposed to coal dust on a regular basis. (DX 33, p. 15, 17). I find that the report of Dr. Zawarhy is well reasoned within the meaning of the Act because he gave underlying documentation in the form of his pulmonary function exam, and he summarized and evaluated the x-rays, the arterial blood gas study and he conducted a complete physical examination. (DX 7, p. 4-6). Thus, after Dr. Zawarhy rehabilitated his report by assigning Claimant the correct coal dust exposure history of ten months, I find it is more well reasoned that the medical report of Dr. Michos.

Accordingly, Dr. Zawahry established that Claimant has a restrictive component to his respiratory disease that could only be caused by exposure to coal dust - proving that Claimant's pulmonary impairment arose out of his coal mine employment - which establishes that Claimant has "legal pneumoconiosis." The director stipulated that Claimant's pulmonary disease was totally disabling. Furthermore, Dr. Zawahry opined that Claimant's coal dust exposure contributed to his obstructive pulmonary impairments. Under the express language of 20 C.F.R. § 718.201(b) (2001), I find that Claimant's pulmonary impairment is related to his coal mining employment and is significantly related to the pulmonary impairment due to smoking. I also find that the portion of Claimant's pulmonary impairment due to coal mine employment substantially aggravated his pulmonary impairment due to smoking based on the fact that his coal mine exposure by its self was sufficient enough to cause a restrictive lung impairment. Dr. Zawahry clearly related that the restrictive component of Claimant's lung disease was a contributing cause to his total respiratory disability. Therefore, I find that Claimant has established entitlement under the Act because he has legal pneumoconiosis arising out of his coal mine employment, he has a totally disabling respiratory impairment, and the pneumoconiosis is a contributing cause to his total respiratory disability.

B. Onset of Disability

When a miner is totally disabled due to pneumoconiosis, "benefits are payable to such miner beginning with the month of onset of total disability." 20 C.F.R. § 725.503(b) (2000). When the evidence does not clearly establish the date of onset, the "benefits shall be payable to such miner beginning with the month during which the claim was filed, . . ." *Id.* A miner who files a duplicate claim cannot receive benefits for any time preceding the final adjudication of the prior claim. *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1364 (4th Cir. 1996). Here, this claim was filed on March 10, 1997, and I find that Claimant is entitled to benefits from that date.

III. ORDER

IT IS ORDERED that the claim for benefits, filed by Steven Worley, is GRANTED and benefits are payable commencing March 10, 1997.

IT IS FURTHER ORDERED that, Claimant's counsel is allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS Pursuant to 20 C.F.R. Section 725.481, any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this order, by filing a notice of appeal with the Benefits Review Board at P. O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq., Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N. W., Washington, DC 20210.